



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10**

1200 Sixth Avenue  
Seattle, WA 98101

March 30, 2007

Reply to  
Attn of: ECL-115

Department of the Army  
U.S. Army Engineer District, Alaska  
P.O. Box 6898  
Elmendorf AFB, AK 99506  
Attn: Richard Ragle

RE: Inventory Project Report for Kiska Island Garrison

Dear Mr. Ragle:

The U.S. Environmental Protection Agency (EPA) received the draft Inventory Project Report (INPR) for the Kiska Island Garrison as transmitted via your letter of February 15, 2007, to the Alaska Dept. of Environmental Conservation (ADEC). ADEC forwarded this report to EPA for our review and comment. We appreciate the opportunity to provide these comments to you.

The INPR for Kiska concludes, most significantly, that military munitions remaining on the island, while meeting the CERCLA definition of "hazardous substances," are not eligible for response action by the Corps of Engineers because of the CERCLA "act of war" defense. At the outset, EPA recognizes Kiska Island as one of the few locations of open combat on U.S. soil during World War II. EPA understands that Kiska Island was invaded by Japanese troops in June 1942 and was retaken by U.S. troops on August 15, 1943. As EPA understands the situation, prior to reoccupation by U.S. troops, U.S. forces conducted bombing and strafing missions over Kiska in 1942. EPA further understands that the U.S. Navy in August 1943 conducted heavy shelling of the island directed at Japanese gun positions.

Beyond these combat actions, it appears that some of the munitions, components, or other contamination remaining on Kiska Island resulted from military activities pre-dating the Japanese invasion in 1942 or post-dating the U.S. reoccupation in 1943. For example, after the war in the Aleutians ended, the federal government has acknowledged that the U.S. military simply buried much of the remaining ordnance on the island. As we know, munitions demolition and disposal, as well as military construction, training, and maintenance practices, have given rise to liability under CERCLA at any number of other U.S. military facilities.

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CERCLA Section 107(b)(2) provides a possible defense to liability that parties otherwise liable under CERCLA Section 107(b)(1) shall not be liable for the release of hazardous substances "caused solely by ... an act of war...." 42 U.S.C. § 9607(b)(2). Given the island's unique history, it is possible that parties otherwise liable for some of the military contamination at Kiska may be able to assert the "act of war" defense under CERCLA. However, EPA disagrees with the finding under "Project Eligibility" to the extent that it would apply the "act of war" defense to all releases on Kiska Island instead of just those releases related to combat operations on the island.

Furthermore, we note that the "act of war" defense is not a bar to cleanup action by the Army; it is only a potential affirmative defense to liability under CERCLA. Thus, CERCLA's broad grant of response authority to the President, as delegated to the Defense Department by Executive Order 12580, is neither affected nor diminished in any way by the theoretical availability of an affirmative defense in a cost recovery action that may never be filed. Even if not required by CERCLA, the Army could respond to munitions contamination at Kiska may well prevent severe injuries or fatalities from unexploded ordnance remaining on the island.

Questions concerning any technical work plan for Kiska Island should be directed to Harry Craig at (503) 326-3689. Legal questions may be directed to Cliff Villa, Esq. at (206) 553-1185. We look forward to your timely reply.

Sincerely,

Deb Yamamoto, Manager  
Site Cleanup Unit 2  
Office of Environmental Cleanup

cc: John Halverson, ADEC  
Harry Craig, OOO  
Clifford Villa, ORC